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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM MULLIN,

Petitioner,

v.

RAYTHEON COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

I. Whether, as the district court ruled, summary judgment for respondent was warranted on petitioner's disparate impact claims on the ground that petitioner failed to rebut respondent's business necessity defense.

II. Whether summary judgment for respondent was warranted on petitioner's disparate impact claims on the ground that petitioner failed to adduce evidence sufficient to support a prima facie case of age discrimination.

III. Whether petitioner waived his argument that the provisions of the Age Discrimination in Employment Act of 1967 ("ADEA") codified at 29 U.S.C. § 623(a)(2) prohibit disparate impact discrimination where he never raised that argument in the district court and did not raise it in the court of appeals until his rehearing petition.

IV. Whether a cause of action premised on disparate impact is recognized under the provisions of the ADEA codified at 29 U.S.C. § 623(a)(1).

V. Whether the court of appeals properly predicted that the Massachusetts Supreme Judicial Court would not recognize a disparate impact claim of age discrimination under Massachusetts law.

LIST OF PARTIES.

The parties named in the caption, William Mullin and Raytheon Company, were the only parties to the proceedings before the court of appeals and the district court. Raytheon Company has no parent companies and no nonwholly owned subsidiaries.

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent Raytheon Company respectfully opposes the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW.

The opinion of the court of appeals affirming the district court (Pet. at 1a) is reported at 164 F.3d 696 (1st Cir. 1999). The orders of the court of appeals denying petitioner's petition for rehearing (Pet. at 45a) and suggestion for rehearing en banc (Pet. at 49a) are unreported. The opinion of the district court (Pet. at 23a) is reported at 2 F. Supp. 2d 165 (D. Mass. 1998).

JURISDICTION.

Jurisdiction is as stated by petitioner.

STATUTES INVOLVED.

Respondent provides the following supplementation to petitioner's description of the statutes involved.

This case also involves the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, the relevant text of which is set forth in the attached appendix.

STATEMENT OF THE CASE.

Factual Background.

Respondent provides the following supplementation to petitioner's description of the facts.

In 1994 and 1995, Raytheon underwent a major restructuring in response to defense industry cutbacks. (Pet. at 25a). Although the company eliminated redundant positions and either laid off or reassigned a number of employees, petitioner was neither reassigned nor laid off. (*Id.*). In the wake of this restructuring, Raytheon set out to determine whether the salaries and grades of remaining employees reflected their actual job descriptions and responsibilities. (*Id.*). This review was consistent with Raytheon's policy of paying its employees according to the level of work they currently performed, and not according to historic salary levels. (Pet. at 33a). In petitioner's case, Raytheon decided that his job responsibilities were not commensurate with his grade. (Pet. at 25a). Based on this decision, petitioner's job grade was lowered, resulting in a reduction of his salary. (*Id.*). Petitioner did not dispute either Raytheon's business justification for undertaking the salary and grade review or the determination that his position responsibilities did not fall within the criteria for his grade. (Pet. at 30a, 42a). Similarly, petitioner did not suggest any way Raytheon could have achieved its ends while imposing no disparate impact on its older workers. (Pet. at 42a).

In support of his disparate impact claim, petitioner offered the expert opinion of a labor statistician. (*Id.*). Petitioner's statistics purported to show that employees aged fifty and older were more likely to be demoted during the restructuring than younger workers. (Pet. at 33a). The same calculations, however, showed that no such inference could be drawn for the protected class as a whole, i.e., for workers aged forty and over. (*Id.*). Moreover, considering only the pool of workers who were downgraded from the same level

as petitioner, there was no statistically significant disparate impact even among employees aged fifty and over. (*Id.*).

Proceedings Below.

Respondent provides the following supplementation to petitioner's description of the proceedings below.

Raytheon moved for summary judgment on all counts of petitioner's complaint on January 9, 1998. Following a hearing, the district court granted Raytheon's motion in a memorandum and order dated April 20, 1998. (Pet. at 23a). With respect to petitioner's disparate impact claims, the district court assumed without deciding that a disparate impact analysis might be appropriate under some circumstances in an ADEA claim (Pet. at 39a) and under Massachusetts law. (Pet. at 43a). Nonetheless, the court ultimately rejected petitioner's disparate impact claims. The district court first ruled that it was "not at all clear" that petitioner could establish a prima facie case given the nature of his statistical evidence. (Pet. at 41a). In any event, the district court ruled that Raytheon had interposed a business necessity defense, i.e., a business contraction stemming from a downturn in the defense industry, that petitioner had not rebutted, thereby entitling Raytheon to summary judgment. (Pet. at 42a).

On January 13, 1999, the court of appeals affirmed the judgment of the district court. (Pet. at 1a). With respect to petitioner's claims of disparate impact, the court of appeals ruled that neither the ADEA nor Massachusetts law recognizes a claim for disparate impact age discrimination. (Pet. at 7a-21a). Raytheon had also argued that the district court's

judgment was correct based on petitioner's inability to establish a prima facie case and on Raytheon's unrebutted business necessity defense, but the court of appeals did not reach those issues.

Before the district court and on appeal petitioner had relied upon provisions of the ADEA codified at 29 U.S.C. § 623(a)(1). In his January 27, 1999, petition for rehearing and suggestion for rehearing en banc, petitioner raised, for the first time, a new argument that the court of appeals had failed to consider language contained in 29 U.S.C. § 623(a)(2) when it rejected his disparate impact claim. (Pet. at 46a).

On February 10, 1999, the court of appeals denied the petition for rehearing (Pet. at 45a) and suggestion for rehearing en banc. (Pet. at 49a). In denying the petition, the court ruled that petitioner had waived his right to rely on 29 U.S.C. § 623(a)(2) by not raising it below. (Pet. at 46a). The court then briefly considered § 623(a)(2) and concluded, in dicta, that the language of that section did not appear to support petitioner's position. (Pet. at 46a-47a).

REASONS FOR DENYING THE PETITION.

I. IT IS NOT NECESSARY IN THIS CASE TO DECIDE WHETHER THE ADEA PROHIBITS DISPARATE IMPACT DISCRIMINATION BECAUSE THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT FOR RESPONDENT WAS WARRANTED ON SEPARATE AND INDEPENDENT GROUNDS.

There is no reason for the Court to address the questions raised in the petition because petitioner's disparate impact claims fail on other grounds. Indeed, the district court assumed without deciding that petitioner could bring claims of disparate impact discrimination under the ADEA and Massachusetts law. (Pet. at 39a, 43a). The court went on to rule that any such claims must fail. (Pet. at 40a-43a). Although the court of appeals affirmed on different grounds by ruling that disparate impact claims were not viable, this Court "could consider grounds supporting [the] judgment different from those on which the Court of Appeals rested its decision." *Heckler* v. *Campbell*, 461 U.S. 458, 468 n.12 (1983).

Even if petitioner could pursue disparate impact claims under the ADEA or Massachusetts law, there are two reasons those claims must fail. First, to establish a prima facie case of age discrimination, petitioner is required to demonstrate a statistically discernible disparate impact on the protected class as a whole, i.e., on all employees forty and older. *Criley* v. *Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir.), *cert. denied*, 118 S. Ct. 626 (1997); *Lowe* v. *Commack Union Free School Dist.*, 886 F.2d 1364, 1372-74 (2d Cir. 1989). He failed to do so. (Pet. at 33a, 41a). Second, even if peti-

tioner could establish a prima facie case of age discrimination, he offered no evidence to defeat Raytheon's business necessity defense. (Pet. at 42a). That defense was established through unrebutted evidence that the company had suffered a business contraction stemming from a downturn in the defense industry. (*Id.*). Because the ultimate result reached in this case was proper regardless of the answers to the questions presented in the petition, there is no reason for the Court to address those questions.

II. THIS CASE WOULD NOT PRESENT A FULL OPPORTUNITY TO CONSIDER THE AVAILABILITY OF A DISPARATE IMPACT CLAIM UNDER THE ADEA BECAUSE, AS THE COURT OF APPEALS RULED, PETITIONER IS FORECLOSED FROM RELYING UPON 29 U.S.C. § 623(a)(2) BY HIS FAILURE TO ASSERT AN ARGUMENT BASED ON THAT PROVISION IN THE DISTRICT COURT OR UNTIL HIS REHEARING PETITION IN THE COURT OF APPEALS.

A central argument advanced by petitioner in support of his position was not raised below and would not properly be before this Court. In his petition, petitioner contends that the court of appeals failed to consider the language of 29 U.S.C. § 623(a)(2) and that this section "supports the recognition of the disparate impact theory." (Pet. at 8-9). But, as the court of appeals ruled (Pet. at 46a), petitioner failed to raise this argument below, thereby foreclosing his ability to rely upon it.

Petitioner's failure to raise the issue in a timely fashion is significant, because it prevented the proper development of a record on the point. Neither the district court nor the court of appeals considered the issue, other than in brief dicta by the court of appeals in response to petitioner's petition for a rehearing. (Pet. at 46a-47a). It is this Court's "settled practice" to consider "only in exceptional cases" issues not raised below. *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) (citations omitted). A failure to raise an issue below deprives the Court of the benefits of "a well-developed record and a reasoned opinion on the merits" from the lower courts. *Bankers Life and Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 80 (1988).

Because petitioner failed to raise below the question he now raises, i.e., whether the entirety of the ADEA prohibits disparate impact discrimination, that question would not properly be before the Court if this certiorari petition was granted. Instead, the only question properly before the Court would be the more limited one raised below, i.e., whether one specific section of the ADEA, codified at 29 U.S.C. § 623(a)(1), prohibits such discrimination. If, as petitioner contends, 29 U.S.C. § 623(a)(2) is central to the question of whether a disparate impact claim is viable under the ADEA, this Court should defer review of the question to a case which properly raises an argument based on that section.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE ADEA DOES NOT RECOGNIZE A CAUSE OF ACTION PREMISED ON DISPARATE IMPACT.

The court of appeals concluded correctly that the ADEA does not prohibit disparate impact discrimination. In reaching this conclusion, the court relied on four considerations. First, this Court's unanimous decision in *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993), suggests that a cause of action premised on disparate impact is not viable under the ADEA. *Id.* at 610-11. (Pet. at 9a-11a). Additionally, in a concurring opinion for himself and two other Justices, Justice Kennedy specifically noted that there are "substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Id.* at 618. (Pet. at 10a-11a). In analyzing *Hazen Paper*, the court of appeals observed that the Sixth, Seventh, and Tenth Circuits rejected disparate impact claims following *Hazen Paper*. (Pet. at 11a).

Second, the language of the ADEA does not support a disparate impact claim. (Pet. at 11a-13a). The statute contains a broad exception pursuant to which otherwise prohibited actions are lawful if based on "reasonable factors other than age." 29 U.S.C. § 623(f)(1). The court of appeals properly concluded that this exception cannot be reconciled with a disparate impact claim. (Pet. at 12a).

Third, the legislative history of the ADEA does not support such a claim. (Pet. at 14a-15a). In short, the ADEA followed a detailed study by the Department of Labor on the causes and effects of age discrimination, and that report "segregated the appropriate remedies for disparate treatment from those for disparate impact." (Pet. at 14a). A fair reading

of the ADEA indicates that Congress gave effect to this dichotomy by proscribing only intentional discrimination. (*Id.*).

Fourth, the enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, which specifically provided for disparate impact claims under Title VII but did not do so under the ADEA, provided further cause for rejecting petitioner's claim. (Pet. at 15a-16a).

Based on these four considerations, the court of appeals correctly held that the ADEA does not prohibit disparate impact discrimination. As a result, there is no cause for this Court to grant the petition.

IV. THE ISSUE OF WHETHER A DISPARATE IMPACT CLAIM LIES UNDER THE ADEA IS NOT RIPE FOR REVIEW BY THIS COURT BECAUSE, SINCE *HAZEN PAPER*, NO COURT OF APPEALS HAS RECOGNIZED SUCH A CLAIM IN A CASE WHERE IT WAS DISPOSITIVE.

The principal question raised by the petition, whether a disparate impact cause of action lies under the ADEA, is not yet ripe for decision by this Court. As noted by the court of appeals (Pet. at 9a-11a, 15a-16a), two recent developments have affected the interpretation of the ADEA. First, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. In that act, Congress amended Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000e-2000e-17, to provide explicitly for causes of action based upon disparate impact, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75, and simultaneously amended the ADEA

without creating a corresponding disparate impact cause of action. *See, e.g., id.* at § 115, 105 Stat. at 1079. (Pet. at 15a). Second, this Court issued an unanimous decision in *Hazen Paper, supra*, which reflected the Court's hostility towards recognizing a disparate impact theory under the ADEA. (Pet. at 9a-11a). Since these developments in the law, no court of appeals has fully explored the issue and dispositively held that a disparate impact cause of action is viable under the ADEA. As a result, this issue is not ripe for review for two reasons. First, the post-*Hazen Paper* jurisprudence lacks a meaningful analysis of the disparate impact theory from a court of appeals that found in favor of such a claim, so this Court does not have the benefit of reasoned opinions on both sides of the issue. Second, the apparent circuit split that petitioner relies upon may be eliminated when the two circuits holding the minority view are presented with the issue in a case where it is dispositive.

Since the *Hazen Paper* decision, the Second and Eighth Circuits have reaffirmed pre-*Hazen Paper* caselaw recognizing the viability of a disparate impact ADEA claim, but they have neither given the issue detailed consideration nor addressed it in a case where it was dispositive. *See Criley*, 119 F.3d at 105; *Dist. Council 37* v. *N.Y. Dept. of Parks & Rec.*, 113 F.3d 347, 351 (2d Cir. 1997); *Lewis* v. *Aerospace Community Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997); *Thomas* v. *First National Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997); *Smith* v. *City of Des Moines*, 99 F.3d 1466, 1470 (8th Cir. 1996); *Houghton* v. *SIPCO, Inc.*, 38 F.3d 953, 958-59 (8th Cir. 1994).

In the most recent Eighth Circuit case, the court affirmed a grant of summary judgment to the defendant employer on

the plaintiff's ADEA disparate impact claim on the ground that the plaintiff had failed to adduce sufficient evidence to create a triable issue of fact. *Lewis*, 114 F.3d at 750. The court stated, in dicta, that "our circuit continues to recognize the viability of such claims under the ADEA." *Id.* The court provided no analysis in support of this proposition, but merely cited *Smith*. *Id.*

In *Smith*, not unlike *Lewis*, the Eighth Circuit did not illuminate the ADEA disparate impact issue because it affirmed a grant of summary judgment in favor of the defendant employer on the ground that the plaintiff had not presented evidence sufficient to create a triable issue on the defendant's business necessity defense. *Smith*, 99 F.3d at 1473. The *Smith* court, again in dicta, stated that the law of the circuit recognized the viability of a disparate impact claim. *Id.* at 1470. The only support that the *Smith* court provided for the proposition, however, was that the court had, after *Hazen Paper*, recognized the claim in *Houghton*. The decision in the *Houghton* case, however, is even less instructive. In *Houghton*, the Eighth Circuit concluded that the jury had been charged improperly and therefore ordered a new trial on a disparate impact claim. But the court did not address the issue of whether a disparate impact theory is viable under the ADEA. In sum, although Eighth Circuit caselaw states that the law in the circuit remains that a disparate impact ADEA claim is viable after *Hazen Paper*, in none of the cases was the issue dispositive and no case contained a close analysis of the issue in light of the *Hazen Paper* decision.

The decisions of the Second Circuit subsequent to *Hazen Paper* are similarly undeveloped. In *Dist. Council 37*, the court of appeals affirmed a jury verdict for the employer on a

disparate impact claim under the ADEA, rejecting the plaintiff's challenge to the jury instructions. *Dist. Council 37*, 113 F.3d at 357. In dicta, the court addressed an alternative argument raised by the employer, that a disparate impact claim was not viable under the ADEA. *Id.* at 351. Without analysis, and based only on a citation to the pre-*Hazen Paper* case of *Maresco* v. *Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106 (2d Cir. 1992), the court stated that the law of the circuit was that a disparate impact ADEA claim can be made. *Id.*

In *Criley*, the Court acknowledged that "in our circuit, we have recognized such an [ADEA disparate impact claim]," but went on to affirm a grant of summary judgment to the defendant employer on the ground that the plaintiff's evidence was not sufficient to support such a claim. *Criley*, 119 F.3d at 105. The court did not analyze the disparate impact issue, but simply cited the *Dist. Council 37* case and the pre-*Hazen Paper, Maresco* case. *Id.* The Second Circuit, therefore, like the Eighth Circuit, has not decided a case where the viability of a disparate impact claim under the ADEA was a dispositive issue.

Petitioner contends that a third court of appeals, the Ninth Circuit, also recognizes the viability of a disparate impact ADEA claim. The Ninth Circuit, however, has not reaffirmed its pre-*Hazen Paper* rulings favoring a disparate impact claim. To the contrary, it has expressed doubts as to the correctness of those decisions, noting that the *Hazen Paper* decision provided "some indication that the theory should not apply." *Mangold* v. *Cal. Pub. Util. Commn.*, 67 F.3d 1470, 1474 (9th Cir. 1995). (Pet. at 11a). Although in the Ninth Circuit there are district court cases to the contrary, *see*

Kaplan v. Cal. Public Employees' Retirement Systems (PERS), 1998 WL 575095 (N.D.Cal. 1998), at least one district court in the Ninth Circuit has concluded as a result of the *Mangold* decision that there is no controlling authority in the Ninth Circuit on the issue, and has held that disparate impact claims were not cognizable under the ADEA. *Frank* v. *United Airlines*, 1997 WL 258890 (N.D.Cal. 1997). At this point, therefore, it is premature to conclude that the Ninth Circuit is in conflict with the First Circuit.

The fact that none of the courts of appeals that recognize an ADEA disparate impact claim has, since *Hazen Paper*, reexamined the issue in a case where it was dispositive of the outcome; the fact that the disparate impact analysis by these courts has included little more than a reference back to pre-*Hazen Paper* cases; and the fact that the majority of the courts of appeals that have addressed the issue after *Hazen Paper* have held that the ADEA does not recognize disparate impact claims (Pet. at 9a), all suggest that the circuit split upon which petitioner relies is not settled. This Court would benefit from delaying its review of the ADEA and disparate impact issue until the two courts of appeals holding the minority view have had the opportunity to review the issue squarely in a case where it will determine the rights of the parties. At the least, in delaying review, the Court will allow for a more thorough analysis of the disparate impact theory under the ADEA than currently exists from any court of appeals that recognize the claim. Alternatively, a delayed review could result in the elimination of the apparent circuit split upon which petitioner relies.

V. THE COURT OF APPEALS' INTERPRETATION OF STATE LAW DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION.

The second question presented in the petition asks whether the court of appeals correctly interpreted Massachusetts law. This Court normally will not review a federal court's interpretation of state law. *Leavitt* v. *Jane L.*, 518 U.S. 137, 144 (1996). Departures from this practice have occurred only rarely, and only in exceptional circumstances, such as "blatant federal-court nullification of state law." *Id.* In fact, even when recently confronted with such a "blatant" nullification, this Court was split on whether it should review the lower court's ruling. *Id.* at 146 (Stevens, J., dissenting) ("It is contrary to our settled practice to grant a petition for certiorari for the sole purpose of deciding a state-law question ruled upon by a federal court of appeals.").

The reasons for this practice are sound and "well established." *Id.* First, "the courts of appeals are more familiar with and thus better qualified than [this Court] to interpret the laws of the States within their Circuits." *Id.* Second, "the decision of a federal court . . . on a question of state law is not binding on state tribunals." *Id.* Third, "a decision of a state-law issue by a court of appeals, whether right or wrong, does not have the kind of national significance that is the typical predicate for the exercise of [this Court's] certiorari jurisdiction." *Id.*; *see also Thomas* v. *American Home Products, Inc.*, 519 U.S. 913, 117 S. Ct. 282, 284 (1996) (Rehnquist, C.J., dissenting) ("Court's function, generally speaking, is not to correct federal courts' misapplications of state law"); *Salve Regina College* v. *Russell*, 499 U.S. 225,

242 (1991) (Rehnquist, C.J., dissenting) (Discrete state-law decisions "are not sources of law but only reflections of the jurisprudence of the courts of a State.").

The second question presented by petitioner, whether the court of appeals properly interpreted Massachusetts law, does not raise any important federal questions. The court of appeals recognized and faithfully complied with its responsibilities under the doctrine announced in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), which requires federal courts to apply a state's substantive law when adjudicating claims arising under that law. The gravamen of petitioner's argument is that the court of appeals "dismissed as dictum controlling language by the Massachusetts Supreme Judicial Court." (Pet. at 13). Petitioner acknowledges, however, that the two cases purportedly containing the "controlling language" did not involve claims of age discrimination. (*Id.*). Another important fact, not acknowledged by petitioner but considered by the court of appeals, is that neither of these two cases involved claims of disparate impact. (Pet. at 18a). As noted by the district court and the court of appeals, no Massachusetts court has expressly ruled that an age discrimination plaintiff can pursue a disparate impact claim under Massachusetts law. (Pet. at 16a-20a, 43a). Faced with a lack of direct authority under Massachusetts law, the court of appeals engaged in a thorough analysis of all relevant Massachusetts cases, of the Massachusetts statute at issue, and of the legislative history of that statute. (Pet. at 16a-21a). Based on its steadfast attempt to adhere to Massachusetts law, the court of appeals complied with the mandate of the *Erie* doctrine. Therefore, the court of appeals' ruling under

Massachusetts law does not present any federal question and does not warrant this Court's review.

CONCLUSION.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ADDENDUM.

RELEVANT PROVISIONS OF
THE CIVIL RIGHTS ACT OF 1991,
PUB. L. NO. 102-166, 105 STAT. 1071

SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Sec. 105(a)

(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end of the following new subsection:

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

"(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

"(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

"(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a re-

spondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

"(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

"(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substance Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin."

Sec. 105(b)

(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative his-

tory of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove — Business necessity/cumulation/alternative business practices.

SEC. 115. NOTICE OF LIMITATIONS PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended—

Sec. 115(1)

(1) by striking paragraph (2);

Sec. 115(2)

(2) by striking the paragraph designation in paragraph (1);

Sec. 115(3)

(3) by striking "Sections 6 and" and inserting "Section"; and

Sec. 115(4)

(4) by adding at the end the following:

"If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt such notice."